FILED
FEB 19 1945
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 869.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Petitioner,

—against—

DIXON, IRMAOS & CIA. LTDA.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES JOSEPH NOBLE,
OSCAR R. HOUSTON,
ARTHUR W. CLEMENT,
Attorneys for Respondent.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This is an action brought by the respondent, a Brazilian firm, to obtain payment of two drafts drawn by respondent on petitioner pursuant to two irrevocable letters of credit issued by petitioner in favor of respondent. The petitioner, The Chase National Bank of the City of New York, dishonored the respondent's drafts when they were tendered under the credits, although they were presented on time and were accompanied by the customary documents.

The letters of credit were issued by petitioner to finance two shipments of cotton which the respondent sold and shipped to a purchaser in Belgium and for which the respondent has never been paid.

The Trial Court dismissed the complaint. The Circuit Court of Appeals for the Second Circuit reversed the Trial Court and directed judgment in favor of the respondent.

The opinion of the Circuit Court of Appeals rendered in directing the judgment which this Court is asked to review is reported at 144 F. (2nd) 759.

The opinion of the United States District Judge, whose decision was reversed, is reported at 53 Fed. Sup. 933.

Facts.

The respondent, an exporter at Sao Paulo, Brazil, sold cotton to a purchaser in Belgium. The petitioner, Chase Bank, upon the purchaser's instructions, issued two irrevocable letters of credit for a total of $10,500 in favor of the respondent to finance the sales (Exhs. 1-2, Appendices, pp. 219 to 221).

The petitioner, Chase Bank, mailed the credits by steamer mail from New York City to Sao Paulo, Brazil, where they were received by the respondent on May 2, 1940 (Finding of Fact No. 3, App. p. 273).

These irrevocable credits bound the petitioner, Chase Bank, irrevocably to honor ninety day drafts, if presented at the office of the Chase Bank in New York on or before May 15, 1940, but not thereafter, if accompanied by documents including a "full set bills of lading".

The respondent, relying on petitioner's irrevocable credits, duly shipped the cotton in two separate shipments to its Belgian customer from Sao Paulo, Brazil, and received therefor two originals of each of two bills of lading (Finding of Fact No. 7, App. pp. 274-275).

It was proven beyond contradiction at the trial, and found by the Trial Judge (1) that it was the established custom where two originals of a bill of lading were obtained, to send one original bill of lading by one mail, and the other original bill of lading by following mail (Finding of Fact No. 6, App. p. 274); and (2) that in accordance with that custom, the respondent sent the docu-

ments from Sao Paulo, Brazil to New York City for presentation to the petitioner, sending one of each of the bills of lading by airmail (the only mail scheduled to arrive in New York City on or before May 15, 1940 (Finding of Fact No. 4, App. p. 273)), on May 6, 1940, and the others by steamer mail (Finding of Fact No. 7, App. pp. 274-275).

On May 15, 1940, the day the credits expired, only the bills of lading which had been forwarded by airmail had reached New York, and accordingly, on May 15, 1940, respondent's New York representative presented to the petitioner the drafts and documents, including the two originals of the bills of lading which had reached New York and were available (Finding of Fact No. 9, App. p. 275).

With said available originals of the bills of lading, the Guaranty Trust Company tendered to petitioner its guaranties against loss (Exhs. 7, 14, App. pp. 226-232) for the other original bills of lading which had been issued and which were in the mail on the way to New York by steamer, but which had not as yet reached New York (Finding of Fact No. 9, App. p. 275).

Petitioner conceded at the trial that it had no objection to the form of the guaranties and that it had no question as to the responsibility of the Guaranty Trust Company of New York (Powelson, App. p. 165), and the Court so found (Findings of Fact Nos. 12, 12A, 12B, App. p. 276). But the petitioner nevertheless rejected the drafts upon the ground that half of the bills of lading was missing (Exhs. 8, 15, App. pp. 227 and 233).

Two other alleged reasons for rejecting the drafts were also given by the petitioner (see Exhs. 8, 15, App. pp. 227, 233), but both of these alleged additional reasons, have been abandoned by the petitioner.

Respondent established at the trial that on May 15, 1940, and for some time prior thereto, there existed a general and uniform custom among New York banks, exporters and importers, of tendering and accepting the available original of a bill of lading with a prime bank guaranty under credits mentioning a full set of bills of lading where the different originals of the bills of lading issued came from a distance by separate mails, if the bank determined that the guaranty was satisfactory in form, and if it was satisfied as to the responsibility of the bank issuing the guaranty.

Six officials from five of the leading banks in New York City, including the Chase Bank (Strelow, App. pp. 79-80; Carr, App. pp. 53-54; Ward, App. p. 192; Andel, App. p. 181; Metzger, App. p. 204; Powelson, App. pp. 165-168) and two importers and exporters (Dixon, App. pp. 71-72; Boedtker, App. p. 103) testified that the custom above stated existed; and there was further testimony that to accept the available original and a prime bank guaranty under credits like those in suit was the normal circumstance (Ward, App. p. 191), and that it was done every day (Strelow, App. p. 80). These same officials and two additional officials of the Chase Bank (Cain, App. p. 108; Tovell, App. p. 127) testified that they knew of no case where a tender such as the respondent made herein was rejected solely for the reason that one of the originals of the bills of lading had been tendered when the available originals of the bills of lading were tendered with a prime bank guaranty for the other originals coming from a distance by separate mail.

In short, it is the only known time in the history of commercial credits that a bank has repudiated its credits under the circumstances herein involved.

The Circuit Court of Appeals held that "the existence of the custom was established beyond dispute", saying (p. 762):

> "Numerous witnesses, experts in the fields of banking and of commerce, testified to the existence of the custom; not one testified to a single instance where a tender such as was here made had been rejected and the draft dishonored solely on the ground that the set of bills of lading was incomplete. Indeed it is clear that the Chase Bank would in this very case have honored the drafts, had they been presented before the German invasion of Belgium. One of its witnesses naively said that before May 15, 1940 it was the custom to accept such a guaranty as was tendered, but not on that date or thereafter—as though the determining moment were not at the latest when the plaintiff acted upon the letters of credit."

The Circuit Court of Appeals reversed the decision of the Trial Judge and awarded the plaintiff judgment for the amount of the drafts. It is that decision which this Court is asked to review.

I.

The decision of the Circuit Court of Appeals involves no violation of the Parole Evidence Rule.

This point is so completely dealt with by the Circuit Court of Appeals that we can do no better than to quote from the opinion of the Circuit Court of Appeals as follows (p. 762):

> "It is true, as the defendant argues, that the law requires strict compliance with the terms of a letter

of credit. *International Banking Corp.* v. *Irving Nat. Bank*, 2 Cir., 283 F. 103. It is likewise true that numerous cases, several of which are cited by the defendant, declare that evidence of a custom is not admissible to contradict the unambiguous terms of a written contract. *DeWitt* v. *Berry*, 134 U. S. 306, 312, 10 S. Ct. 536, 33 L. Ed. 896; *Transatlantic Shipping Co.* v. *St. Paul F. & M. Ins. Co.*, 2 Cir., 9 F. 2d 720, 723; *Hopper* v. *Sage*, 112 N. Y. 530, 535, 20 N. E. 350, 8 Am. St. Rep. 771; *Green* v. *Wachs*, 254 N. Y. 437, 441, 173 N. E. 575. But it is also well settled 'that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary'. *Hostetter* v. *Park*, 137 U. S. 30, 40, 11 S. Ct. 1, 4, 34 L. Ed. 568. See also *Nicoll* v. *Pittsvein Coal Co.*, 2 Cir., 269 F. 968, 972; *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter*, D. C. S. D. N. Y., 299 F. 991; *Victor* v. *National City Bank*, 200 App. Div. 557, 193 N. Y. S. 868; Id., 206 App. Div. 664, 199 N. Y. S. 955, affirmed 237 N. Y. 538, 143 N. E. 733; *Mutual Chemical Co.* v. *Marden, Orth & Hastings Co.*, 235 N. Y. 145, 151, 139 N. E. 221; Williston, *Contracts*, rev. ed. §§ 650, 652, 1081A. In our opinion the custom under consideration explains the meaning of the technical phrase 'full set of bills of lading' and is incorporated by implication into the terms of the defendant's letters of credit. * * * The reasonableness and utility of the local New York custom is obvious. It is absolutely essential to the expeditious doing of business in overseas transactions in these days when one part of the bill of lading goes by air and another by water. Unless an indemnity can be substituted for the delayed part, not only does quick clearance of such transactions become impossible but

also the universal practice of issuing bills of lading in sets and sending the different parts by separate mails loses much of its purpose."

II.

The decision of the Circuit Court of Appeals involves no violation of the rule of *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938), and it does not conflict with the decisions of the New York Court of Appeals in the case of *Silberman* v. *Clark*, 96 N. Y. 522 (1884), or with any other New York decision.

It may be noted first that this point was not raised by the petitioner on either the trial of the action or the argument of the appeal before the Circuit Court of Appeals.

The only prior mention of the rule in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, and of the case of *Silberman* v. *Clark*, 96 N. Y. 522, on this point was in a petition for a rehearing submitted to the Circuit Court of Appeals after it had rendered its decision, and it was just mentioned there, merely "suggested" by counsel.

The holding of the New York Court of Appeals in *Silberman* v. *Clark*, 96 N. Y. 522, does not conflict with the decision of the Circuit Court of Appeals in the present case.

The point involved in the *Silberman* case was whether under a contract for the sale of rails "f. o. b., Continental port. Inspection at maker's works", the purchaser was obligated to pay for the "inspection".

The Court of Appeals gave the basis for its decision in the following language:

> "The purchasers were bound to do but one thing and that was to pay through the letter of credit. The

> price was named and that was all they were to pay. The rails were to be inspected before their delivery and were to be delivered free on board the vessel for the price named. Inspection was one of the things to be done in pursuance of the contract, and the expenses of that, like all the other expenses touching performance, were to be borne by the sellers. The words 'free on board' and the provision as to inspection, are to be construed together. The buyers were to have the rails free on board with the inspection, and this they could not have if they were to be subjected to the expenses of inspection. We think this is the natural and obvious construction of the language used and should prevail."

Clearly there is no conflict between that decision and the present case.

The New York State Court of Appeals has uniformly held that evidence of a custom and usage is admissible to explain how words and expressions are used in trade or business.

> *Mutual Chemical Co.* v. *Marden*, 235 N. Y. 145 (1923);
>
> *Victor* v. *The National City Bank of New York*, 200 App. Div. 557 (1922); same case, 206 App. Div. 664 (1923), affirmed 237 N. Y. 538 (1923);
>
> *Thomas* v. *Scott*, 127 N. Y. 133 (1891).

The Federal Court decisions, including the decisions of the United States Circuit Court of Appeals for the Second Circuit, follow the same rule.

> *Eames* v. *Claflin*, 239 Fed. 631 (C. C. A. Second 1917);

Nicoll v. *Pittsvein Coal Co.*, 269 Fed. 968 (C. C. A. Second 1920);

Kunglig Jarnvagsstyrelson v. *Dexter & Carpenter*, 299 Fed. 991 (S. D. N. Y. 1924).

The decision of the Circuit Court of Appeals is in conformity, therefore, not only with its own prior decisions, but with the decisions of the New York State Court of Appeals.

There are two inaccuracies in the petition which respondent wishes to mention lest the Court be misled. The petition states (pp. 5-6) that the guaranties tendered to the petitioner read:

> "Only one set presented out of a full set of two bills of lading issued."

Actually the guaranties read (Exh. 14, App. p. 232):

> "Only one copy presented out of a set of two bills of lading issued."

The omission of the word "full" from the guaranty indicated that the Guaranty Trust Company did not consider that all originals were the only proper tender under the credits. The available original and the guaranty were proper.

Again petitioner states (p. 5) that respondent's witness (Mr. Carr) testified that the meaning of a full set of bills of lading was confined to all originals issued.

Mr. Carr was being questioned about the tender made to the Guaranty Trust Company, and testified that it had accepted under a credit similar to those in suit, the tender of the available original of the bill of lading with a prime bank guaranty and honored the credit. He was

asked if the term "full set of bills of lading" was confined to the tender of the two originals. His answer was

"Yes, it did, a full set of documents" (App. p. 58).

Having just testified that the Guaranty Trust Company accepted the available original and a prime bank guaranty, his answer obviously was that he considered the available original and the guaranty a proper tender.

III.

Petitioner's argument is that the Chase Bank had the right to disregard the custom and to arbitrarily determine when the documents were presented whether or not it would follow the custom. This argument is wholly without merit.

It is well settled that a custom with reference to which a contract is made is as much a part of the contract as any provision of the contract.

It is equally well settled that, where one party to a contract has relied upon such a custom and acted upon it, the other party to the contract cannot void the contract by arbitrarily and without a legal reason refusing to recognize the binding force of the custom.

The Circuit Court of Appeals properly criticized that part of the Trial Court's opinion which said that the banks could follow the aforesaid custom or not as they saw fit. It should be pointed out that the testimony of the expert witnesses, (1) that the custom existed, and (2) that there was no known case in the history of commercial credits where a similar tender had been rejected, was testimony of fact. The opinions of the witnesses, that the banks were not obligated to follow the custom, were the expressions of opinions on the legal effect of the custom.

Counsel for the petitioner has described the action of the Circuit Court of Appeals in ruling as it did as "capricious" and "erratic". If such words have any place in a brief filed with this Court, it is manifest that they apply here to the conduct of the petitioner, and not to the holding herein of the Circuit Court of Appeals. It is the petitioner's action in departing from its custom for the first time which has undermined the "stability of banking transactions" and the "exactitude with which they should be conducted". If the tender of a bill of lading and guaranty is not proper compliance with the terms of the letters of credit, the petitioner should not have been accepting them daily for years past.

CONCLUSION.

The Writ of Certiorari prayed for should be denied.

Dated, New York, N. Y., February 13, 1945.

Respectfully submitted,

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REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

The following facts are clear:

1. Petitioner's letter of credit provided it would pay respondent's drafts, if accompanied upon presentation by a full set of bills of lading (p. 219);

2. Respondent's drafts, when presented, were not accompanied by a full set of bills of lading;

3. In lieu thereof, the Guaranty Trust Company of New York tendered its guaranty admitting the discrepancy but agreeing to indemnify petitioner against any loss on account thereof (p. 226).